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IN THE

Supreme Court of the United States

October Term, 1987

No. ____

In re

BULLION RESERVE OF NORTH AMERICA,
a California corporation; and related cases,

Debtors.

THEODORE P. BOZEK, *Petitioner,*

v.

CURTIS B. DANNING, CHAPTER 7 TRUSTEE, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
Case No. 86-6649

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Are there any special and important reasons justifying this Court reviewing a grant of summary judgment avoiding a preferential transfer where the evidence in the record establishing the elements of an avoidable preferential transfer is uncontroverted and the applicable law is well established and not the subject of conflicting appellate decisions?

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STATEMENT OF THE CASE[1]

I. Procedural History.

On October 3, 1983, Bullion Reserve of North America ("BRNA") filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code.[2] Thereafter, the case

[1] Because Petitioner misstates the uncontroverted facts established by the evidence in the record and makes statements of "fact" which are not supported by any admissible evidence in the record, Respondent is compelled to present a detailed statement of the case.

[2] BRNA's bankruptcy case was commenced on October 3, 1983. Accordingly, that version of title 11 of the United States Code existing prior

(footnote continued on next page)

was converted to a case under chapter 7 of title 11 of the United States Code, and Curtis B. Danning was appointed Trustee ("Trustee" or "Respondent").

In August 1984, the Trustee filed his Complaint (ER at 1:1)[3] to avoid a transfer of property (precious metals) to Petitioner as a preferential transfer under 11 U.S.C.A. § 547 (b) (West 1979), and to recover the value of the property transferred under 11 U.S.C. § 550.[4] Although Petitioner filed an Answer denying the receipt of metals (ER at 2:5), he

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(footnote continued from preceding page)

to the 1984 Amendments to the Bankruptcy Code applies. Hereinafter, all references to title 11 of the United States Code as it existed prior to the 1984 Amendments will be cited as "11 U.S.C. § .....".

[3] Respondent will use the following conventions to cite to the record below:

(1) "ER" refers to the Excerpts of Record filed by Petitioner Bozek in connection with the proceedings before the Ninth Circuit.

(2) "AER" refers to the Excerpts of Record filed by Respondent in connection with the proceedings before the Ninth Circuit.

(3) "BCR ....." refers to the pleading with the designated Docket No. on the Bankruptcy Court's Clerk's record for the adversary proceeding: *Danning, Trustee v. Bozek*, (Adv. No. LA 84-52169-BR).

(4) "DCR-1" refers to the pleading with the designated Docket No. on the District Court's Clerk's record for the bankruptcy case: *In re Bullion Reserve of North America* (Case No. 83-18026-BR).

(5) "DCR-2" refers to the pleading with the designated Docket No. on the District Court's Clerk's record for the appeal: *Bozek v. Danning, Trustee* (Appeal Case No. CV 86-2539-MRP).

(6) "BRT" refers to the Bankruptcy Court Reporter's Transcript.

(7) "at #:#" refers to the document number and page number of that document, respectively, except for citations to reporter's transcripts in which case it refers to the page number and line number of the transcript.

[4] The Trustee's Complaint against Petitioner sought the recovery of $212,138.60, which amount represents the aggregate value of the metals which were transferred on August 22, 1983 from the metals stored in BRNA's account at Perpetual Storage, Inc. ("PSI") to a newly-established account in Petitioner's name at PSI.

subsequently admitted in his deposition that, after learning of BRNA's financial difficulties, he had BRNA transfer metals to his own account at PSI in August of 1983. (AER at 10:396-98). Petitioner had the opportunity to examine BRNA's books and records (AER at 3:107, 130) and depose those individuals with knowledge of BRNA's activities. (AER at 3:84-88, 91-98, 124-27, 150-53, 156-58, 283-85).

The Trustee filed a motion for summary judgment on December 3, 1986. (AER at 1:1).[5] The Petitioner submitted no evidence other than his own declaration and certain exhibits in opposition to the Trustee's Motion. (ER at 4:76; AER at 6:337-45).

Following a hearing at which it considered the argument of Petitioner's counsel,[6] the Bankruptcy Court entered summary judgment in favor of the Trustee on his complaint (AER at 10A:399A), along with findings of fact and conclusions of law. (AER at 11:399). The Bankruptcy Court concluded that the Trustee had established his *prima facie* case; Petitioner had not presented evidence creating a genuine issue of material fact; and the Trustee was entitled to summary judgment as a matter of law. (AER at 10A:399A). The Bankruptcy Court considered and rejected the arguments Petitioner raises before this Court.

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[5] Petitioner filed a motion for summary judgment in November 1984. (BCR 8). Petitioner's summary judgment motion was fully briefed by the parties. (BCR 8, 32). The motion was denied by the Bankruptcy Court. An Order denying Petitioner's summary judgment motion was lodged with the Court. (BCR 40).

[6] The Petitioner's assertion that no oral argument was permitted (Petitioner's Opening Brief at 3) was incorrect. (AER at 13:428-30).

Petitioner filed a notice of appeal from the summary judgment on March 28, 1986.[7] (AER at 11A:414A). After being transferred from the Ninth Circuit Bankruptcy Appellate Panel to the United States District Court (BCR Docket Entry dated 4/24/86), the appeal ultimately was assigned to the Honorable Marianna R. Pfaelzer (DCR-2 1) who affirmed the summary judgment in all respects by an Order entered on October 27, 1986. (ER at 6:223). Petitioner filed a timely notice of appeal under Fed. R. App. P. 4(a) on November 26, 1986. (ER at 7:229). The United States Court of Appeals for the Ninth Circuit affirmed the summary judgment. *Danning v. Bozek (In re Bullion Reserve of North America),* 836 F.2d 1214 (1988).

Petitioner now petitions this Court for a writ of certiorari. The petition for certiorari is simply a brief on essentially the same legal issues which Petitioner raised and briefed on appeal before the District Court and the Ninth Circuit. These issues were fully considered and rejected by both of these courts. As discussed below, the uncontroverted facts and the well established, nonconflicting law support the decisions of the courts below.

Petitioner's petition does not offer any basis for this Court exercising its discretion and granting certiorari. None of the usual reasons for this Court granting certiorari (or any other reasons) are raised by Petitioner. In fact, there are no special and important reasons for this Court granting certiorari.

II. Statement of the Facts.

The Trustee's action against Petitioner arises out of BRNA's "Member Account Program". Under this program,

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[7] Petitioner also filed a motion with the Bankruptcy Court to correct an alleged clerical error in the summary judgment. (BCR 48). By his motion, Petitioner sought a determination that he could return the bullion received from BRNA to satisfy the judgment in lieu of paying an amount equal to the value of the bullion at the time of the transfer. The motion was denied. (BCR 58). The propriety of that ruling has not been challenged on appeal.

BRNA received vast sums of money from numerous program participants by representing that it would purchase, store, and repurchase precious metals for them. (AER at 1:4; 2:55-56, 64-69; 3:89, 108-122). Persons who chose to purchase metals through BRNA were offered two alternatives: (1) having BRNA execute their purchase orders and immediately deliver to them the metal purchased for their account; or (2) asking BRNA to purchase and store bullion for them. *Id.* Petitioner and virtually all of BRNA's creditors chose to ask BRNA to purchase and store metal for them. (ER at 4:76; AER at 1:4, 6).

When a customer sought to purchase and store precious metals under this program, BRNA recorded the transaction in its computer system. (AER at 3:131, 4:290-92). However, BRNA never deposited the funds received from Petitioner, or from any other program participant, in any trust account specifically designated to segregate funds received from program participants from BRNA's other funds. Instead, funds received from Petitioner and other program participants were commingled in BRNA's bank accounts with funds received by BRNA from other sources. (AER at 1:4, 5-6; 2:56-61; 3:101, 103-22, 133-38, 142-48; 4:287-96).

BRNA used the commingled funds in its bank accounts for various purposes, including, but not limited to: (1) trading on the commodities market; (2) transferring funds to program participants; (3) financing its operations in Texas and Hong Kong; (4) funding its operating expenses; (5) making cash advances to employees; and (6) purchasing precious metals for its own account. (AER at 1:4, 5-6; 2:56-61; 3:108-12; 4:287-92). Thus, although an inventory of precious metals was maintained for BRNA at Perpetual Storage, Inc. ("PSI"), precious metals shipped to PSI for storage were purchased with funds from the commingled monies in BRNA's various bank accounts (AER at 1:4; 2:56-61; 3:100-01, 135-38, 147-48; 4:287-92), and the precious metals inventory was held in BRNA's account at PSI. (AER at 1:4, 8-13; 2:57-61; 3:159-281; 4:287-96). BRNA neither purchased metals for Petitioner or any specific customer

who elected the "metal storage" alternative, nor stored metals in a segregated, identifiable manner for Petitioner or any other customer. *Id.*[8] Accordingly, it is impossible to trace Petitioner's funds, or any other program participant's funds, into specific disbursements or assets of BRNA. (AER at 1:4; 2:57).

When a customer who had elected to have BRNA purchase and "store" bullion requested an account liquidation, the transaction was recorded on BRNA's computer system. (AER at 3:131; 4:290). If the customer requested cash, a check was drawn on BRNA's general, commingled account. (AER at 1:4; 2:60-61; 3:138-41, 144-45; 4:291-92). Alternatively, if the customer requested metals, metals were delivered from the limited inventory of metals held for BRNA at PSI and purchased by BRNA with commingled funds. (AER at 1:4; 2:60-61; 3:141, 148; 4:292).

Because of the often substantial delay between receiving a "storage" customer's funds and an actual request for metal delivery or account liquidation, BRNA was afforded the opportunity to utilize the cash received from "storage" customers for purposes other than the purchase and storage of precious metals. BRNA and its owner, Alan Saxon, took advantage of that opportunity. (AER at 3:103, 108-22). In fact, the precious metals in BRNA's inventory represented only a tiny fraction of those needed to satisfy the claims of all "storage" customers.

Had BRNA used the funds received from "metal storage" customers to purchase and store metals for their accounts, then, according to the company's records, BRNA would have held in storage for the accounts of the thousands of

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[8] Although Petitioner alleges that he "purchased" bullion in 1981 and 1982, the uncontroverted fact is that although he conveyed money to BRNA for the purchase of bullion, BRNA never purchased or stored bullion for Petitioner. Petitioner simply received metal out of BRNA's inventory in August 1983 — months after he made his payments to BRNA. Petitioner cites to no evidence in the record to support his contrary assertion that he ". . . made purchases of bullion" (Petition at 5), because there is none.

program participants over $50 million worth of precious metals when BRNA filed its bankruptcy petition on October 3, 1983. In contrast, BRNA never had in its account at PSI more than $3 million worth of precious metals, and on October 3, 1983 there was less than $1 million worth of precious metals in BRNA's account. (AER at 3:148, 174).

So long as BRNA avoided a panicked request for liquidations, new customer funds were available to finance existing customer liquidations. When BRNA was confronted with increased requests for liquidation, and a decrease in new customer accounts, it was no longer able to hide the losses it had suffered in its commodities trading. (AER at 1:4; 2:61; 3:103, 108-122). As a result, this bankruptcy case was commenced.

In Petitioner's case, he paid BRNA to purchase metals for him at various times. The last such payment occurred in June 1983. (AER at 1:4, 6). As previously explained, however, BRNA did not purchase or store metals for Petitioner, and no metals were transferred to his account until August 22, 1983.

Petitioner claims that, unlike the other "metal storage" customers, BRNA actually purchased and stored metal for him. Petition at 5-6, 22. This bald assertion is unsupported by any admissible evidence in the record; the only "evidence" which Petitioner adduces is Petitioner's declaration as to what he claims he was told in conversations with Patrick Lynch of PSI. However, Petitioner's declaration as to Mr. Lynch's out-of-court statements to him was properly stricken from the record as inadmissible hearsay (BRT 14:15-15:16; AER at 13:426-28; *see* Fed. R. Evid. 801(c)), in a ruling which is not challenged on appeal. Thus, there is *no* admissible evidence in the record to support Petitioner's repeated assertion that BRNA actually purchased and stored metal separately for him at any time prior to the transfer of metal to Petitioner's account in August 1983.

In August of 1983, and after learning of BRNA's financial problems, Petitioner directed BRNA to transfer bullion to

Petitioner's own account at PSI. (AER at 10:394, 396-97). As a result of Petitioner's instructions, on August 22, 1983, BRNA caused 14,950 ounces of silver, 12 ounces of gold, and 39 ounces of platinum to be transferred out of its inventory of metals maintained at PSI to PSI which, in turn, then *first* began to hold the metals for Petitioner under a direct storage contract. (ER at 4:76-77; AER at 1:4, 5; 3:286; 6:341-45; 10:394-97).

SUMMARY OF ARGUMENT

The salient characteristic of the record below is that there was *no probative evidence to counter the Trustee's evidence as to the manner in which BRNA conducted its business.* The Trustee's evidence established that the funds received from Petitioner were immediately commingled with BRNA's other sources of cash; that BRNA did not then purchase any metals specifically for Petitioner or hold any metals in Petitioner's name; that BRNA purchased metals with its commingled funds; that such metals were stored by PSI for BRNA's account; that BRNA was insolvent at the time of the transfer of bullion out of its inventory to Petitioner; and that BRNA's creditors will not receive 100 cents on the dollar. Thus, the issues in this case are not factual issues at all, but legal issues regarding the application of law to uncontroverted facts.

In petitioning this Court for a writ of certiorari, Petitioner asserts no special and important reasons for this Court to exercise its discretion and grant the relief requested. Petitioner has failed to satisfy his burden of establishing a basis for certiorari. Instead of arguing why appellate review by this Court is justified, Petitioner simply raises various legal issues. These legal issues were raised and fully briefed to the courts below and were rejected by those courts.

In essence, Petitioner raises four basic legal issues. First, Petitioner argues that the Trustee did not establish that the metal transferred to Petitioner was "property of the debtor." Petitioner's argument is flawed because it is based upon the factually unsupported allegation that BRNA had purchased

metals for him. The uncontroverted facts are to the contrary and establish that, substantially after he paid BRNA, BRNA transferred metals to an account for Petitioner at PSI *from BRNA's inventory of metals, which BRNA purchased with commingled funds.* The conclusion that the metals transferred were property of BRNA is supported by ample nonconflicting case law. Insofar as Petitioner asserts that the metal conveyed to him was held in trust for him, Petitioner presented no evidence tracing the funds which he originally paid to BRNA into the property transferred to PSI for Petitioner many months later; and controlling federal and state authority establishes that a party asserting a "trust" claim to property held by a bankrupt has the affirmative burden of tracing the property conveyed by the claimant into the specific property to which the claimant asserts a "trust" claim.

Second, Petitioner claims that he was not a "creditor" of BRNA when the bullion was transferred to him, and that there was no "antecedent debt" to him at the time of the transfer, on the bases that: (1) he was never a creditor, because BRNA never breached its contract with him; and (2) at most, he became a creditor only when he made demand for the delivery of metal in August 1983. Neither premise is correct. Under the broad definition of "claim" contained in 11 U.S.C. § 101(4) and applied by all courts including this Court, which includes contingent, unliquidated and unmatured claims, Petitioner first became a creditor of BRNA when he paid BRNA to purchase and store bullion for him.

Third, Petitioner contends that he had only a burden of production, as opposed to the burden of proof, on his asserted affirmative defenses. Petitioner is incorrect as a matter of law. Moreover, Petitioner did not introduce any evidence even to satisfy his claimed burden of production.

Finally, Petitioner argues that the courts below erred in concluding as a matter of law that the "ordinary course of business" defense of 11 U.S.C. § 547(c)(2) does not apply in this case. However, the nonconflicting case law establishes

that section 547(c)(2) was intended only to apply to ordinary trade credit transactions, and not to transfers made in connection with the massive wrongdoing perpetrated on thousands of customers as in BRNA's "metal storage" program.

As evidenced by Petitioner's own arguments, and as more fully discussed below, none of the "character of reasons" justifying this Court's appellate review is asserted or applicable. The decision below is supported by established non-conflicting case law. Furthermore, the decision does not conflict with any California state court decisions, there was no breach of accepted judicial procedures and, most importantly, there is no important federal law issue which this Court must decide.

In short, Petitioner's petition for a writ of certiorari should be denied.

ARGUMENT

I. There Are No Special and Important Reasons Compelling Review on a Writ of Certiorari.

This Court's appellate review on a writ of certiorari is discretionary. Petitioner is not entitled to appellate review by this Court on a writ of certiorari as a matter of right. Rules of the Supreme Court of the United States, Rule 17.1. *Fay v. Noia,* 372 U.S. 391 (1963).

It is incumbent upon Petitioner, as a petitioner seeking a writ of certiorari, to establish "special and important reasons" for this Court's grant of review. Rule 17.1 of the Rules of the Supreme Court of the United States delineates the "character of reasons that will be considered" by this Court in deciding whether to issue a writ of certiorari. Petitioner has failed to satisfy this obligation. In fact, Petitioner has not even attempted to meet his burden. The petition is nothing more than a preliminary brief on the merits, and in that regard it does not present any basis to reverse the decision below. Moreover, none of the reasons generally justifying a grant of certiorari are present.

II. The Ninth Circuit's Decision Does Not Conflict with Other Decisions of Any Federal Court of Appeals or Decisions of this Court.

The legal issues raised by the Trustee's preference action are neither novel nor complex. The Bankruptcy Court for the Central District of California, the District Court for the Central District of California, and the Court of Appeals for the Ninth Circuit each applied the governing law to the facts as established by the uncontested evidence and found in favor of Respondent. The governing law is well established by the case law. In fact, the Ninth Circuit's decision on the legal issues which Petitioner seeks this Court to review is supported by, and does not conflict with, decisions of any Court of Appeals or this Court.

(1) Property of the Estate.

(a) Metals Held by BRNA in its Own Name and Purchased with Commingled Funds Are Presumptively BRNA's Property.

Based upon the uncontroverted evidence introduced by the Trustee, the Bankruptcy Court found that within the 90-day preference period BRNA transferred metals from its account at PSI to Petitioner's account at PSI. The Bankruptcy Court also found upon the uncontroverted evidence that BRNA maintained a minimal perpetual inventory of metals which it used to satisfy a customer's request, and that the metals which were purchased to maintain the inventory were purchased with commingled funds. Based upon these findings, all the courts below concluded that as a matter of law Respondent met his burden of proving that the metals so transferred were property of BRNA.

This conclusion is supported by ample nonconflicting case law. *Coral Petroleum, Inc. v. Banque Paribas-London*, 797 F.2d 1351, 1355-56 (5th Cir. 1986) (debtor has an interest in property under section 547 if the transfer diminishes the bankruptcy estate); *Georgia Pacific Corp. v. Sigma Serv. Corp.*, 712 F.2d 962, 968 (5th Cir. 1983) (funds potentially

impressed with a constructive trust were property of the estate; debtor has sufficient "legal" interest in the funds); *Henderson v. Allred (In re Western World Funding, Inc.)*, 54 Bankr. 470, 475 (Bankr. D. Nev. 1985) (fact that transfers at issue were evidenced by checks drawn on bank accounts of the debtors and honored by the drawee banks constituted "*prima facie* proof that these defendants received transfers of the debtors' property"); *Merrill v. Abbott (In re Independent Clearing House Co.)*, 41 Bankr. 985, 1010-11 (Bankr. D. Utah 1984), *aff'd in part, rev'd in part*, 62 Bankr. 118 (D. Utah 1986) ("Generally, a transfer of property of the debtor, within the meaning of Section 547(b), occurs whenever there is a giving or conveying of anything of value which has debt-paying or debt-securing power.").

Petitioner does not argue that this conclusion conflicts with other existing case law. Instead, Petitioner simply argues that the conclusion is not supported by the cited authorities. Petitioner's argument is without merit.

The Fifth Circuit decision in *Coral Petroleum, Inc. v. Banque Paribas-London*, 797 F.2d 1351 (5th Cir. 1986) , supports the Ninth Circuit's decision. In *Coral Petroleum*, the creditors' committee brought a preference action to recover a loan repayment made to the debtor's lenders. The Fifth Circuit held that the repayment was not an avoidable preference because the property transferred was property of a third party; the debtor had no control over the property transferred. In contrast, here the metals transferred were held by BRNA in its name and purchased by BRNA with its commingled funds. By reason of the transfer from BRNA to Petitioner, BRNA's assets were diminished.

The decision in *Henderson v. Allred (In re Western World Funding, Inc.)*, 54 Bankr. 470 (Bankr. D. Nev. 1985), similarly supports the decision of the courts below. BRNA's transfer of metals held in its own account and purchased with commingled funds is legally indistinguishable from a

delivery of a check drawn on a debtor's account (the property transferred in *Western World*). In both instances the property transferred was held by the debtor in its own name immediately prior to the transfer.

(b) BRNA Never Held Property for Petitioner Pursuant to an Express Trust.

Petitioner argues that the Ninth Circuit erred in concluding that the metals transferred were property of BRNA because: (1) a genuine issue of fact existed as to the creation of an express trust; and (2) the Ninth Circuit erroneously placed on Petitioner the burden of tracing a trust *res*.

To support the creation of an express trust, Petitioner relies solely on BRNA's advertising brochure. The only reference to a trust in the brochure is that Intermountain Depository Corporation would be a trustee for participants' bullion stored at PSI.[9] There is nothing in the record which indicates that BRNA agreed to be a trustee for the funds it received from Petitioner. And, in fact, BRNA took Petitioner's funds, commingled them with other funds and used the funds for its own purposes. BRNA, by its conduct, never intended to be a trustee, and no metal was purchased for Petitioner which would constitute a trust *res*. Accordingly, no trust ever was created.

Moreover, in order to impose a trust on property held by BRNA, it is well established as a matter of federal law that a claimed beneficiary of the trust seeking to enforce the trust in a bankruptcy case must trace his property to the alleged trust *res*. *Schuyler v. Littlefield*, 232 U.S. 707 (1914) (claimant from whom brokerage firm fraudulently obtained shares of stock had burden of tracing stock proceeds into hands of the bankruptcy trustee); *Cunningham v. Brown*, 265 U.S. 1, 1011 (1924) (preference defendants who claimed that the bankrupt's payments to them constituted the return of their

[9] Petitioner asserts that the brochure states that the funds received would be held in trust by Intermountain Depository Corporation, and cites to the brochure. There is no language in the brochure supporting this assertion.

own money, and not a preference, had the burden of tracing the money they had previously transferred to the bankrupt to the money which they subsequently received out of the bankrupt's bank account, even though the bulk of the bankrupt's funds were obtained by fraud); *In re Morales Travel Agency*, 667 F.2d 1069, 1074 (1st Cir. 1981) ("[T]he doctrine of tracing requires the claimant to identify the property he seeks as his own, *not just to exclude the possibility that it belongs to the debtor.*") (emphasis added); *Rosenberg v. Collins*, 624 F.2d 659 (5th Cir. 1980) (customers of commodities investments business sued in a fraudulent conveyance action to recover pre-bankruptcy transfers had the burden to "trace the identity of [their] property"); *Elliott v. Bumb*, 356 F.2d 749, 754 (9th Cir.), *cert. denied*, 385 U.S. 829, (1966) (notwithstanding otherwise applicable state law, alleged trust beneficiary has the burden of identifying a trust *res* in order to enforce a trust in bankruptcy); *Walser v. Int'l Union Bank*, 21 F.2d 294, 298 (2d Cir. 1927) (restitution of money misappropriated from bank constituted voidable preference to bank where no effort was made to trace the misappropriated funds into the jewelry sold to raise the sum repaid to the bank).

Petitioner submitted no evidence to support this tracing requirement. In fact, the evidence submitted by the Trustee conclusively established that Petitioner could not trace the funds he delivered to BRNA to the metals BRNA transferred to him.

(c) Creditor and Antecedent Debt.

Petitioner does not contest the proposition that "claim" and "debt" are defined broadly under the Bankruptcy Code. The proposition is well established. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 309, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6266; S. Rep. No. 989, 95th Cong. 2d Sess. 21, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5808; *see also Ohio v. Kovacs*, 469 U.S. 274, 279 (1985); *Kallen v. Litas*, 47 Bankr. 977, 982-83 (N.D. Ill. 1985).

Again, instead of pointing to a conflict in the law which this Court should resolve, Petitioner argues the merits of his position. Petitioner argues that he was not a creditor and BRNA was not liable on a debt to him because:

> Mr. Bozek purchased the metal months in advance of the preference period. Mr. Bozek did not have a "claim" or "debt" owed to him, he had title to precious metals stored in P.S.I.'s facility which were later delivered to his separate P.S.I. account during the preference period. The only change of legal significance is that Mr. Bozek now had full *custody* of his metals.

Petition at 22. There is absolutely nothing in the record to support this assertion. Rather, the uncontroverted evidence shows that BRNA never purchased metals for Petitioner and, instead, commingled Petitioner's money with other funds and used the funds for BRNA's own purposes.[10]

(d) Exceptions to Section 547(b).

Petitioner's last two arguments also address the merits of the issues raised as opposed to establishing a basis for granting a writ of certiorari. Again, Petitioner's arguments miss the mark.

Petitioner first argues that the Ninth Circuit erroneously placed on Petitioner the burden of proving the affirmative defenses raised by Petitioner. However, the Ninth Circuit's position is supported by relevant, nonconflicting case law. *Production Steel, Inc. v. Sumitomo Corp. of America (In re Production Steel, Inc.)*, 54 Bankr. 417 (Bankr. M.D. Tenn. 1985) (summary judgment entered in favor of debtor where creditor failed to meet his burden of establishing his defense under 11 U.S.C. § 547(c)(2)); *In re American Ambulance*

[10] "Bozek claims that he received bullion at Perpetual Storage Incorporated at the time that he delivered funds to BRNA. However, the record indicates BRNA did not buy and store metal for Bozek upon receiving his money. Rather, BRNA comingled [sic] Bozek's money with that of other customers and purchased bullion for storage in very small amounts. Therefore, it cannot be said that BRNA purchased bullion for any particular customer." 836 F.2d at 1219 n.7.

Service, Inc., 46 Bankr. 658, 660 (Bankr. S.D. Cal. 1985). *Cf.* 11 U.S.C. § 547(g) (West Supp. 1987).[11]

Petitioner also argues that the Ninth Circuit erred in concluding that the ordinary course of business defense does not apply as a matter of law. Petitioner argues that the Ninth Circuit held that BRNA was involved in a Ponzi scheme and a transfer of property made in connection with a Ponzi scheme is not made in the ordinary course of business. Accordingly, Petitioner attempts to distinguish the original Ponzi scheme from the facts of this case. Petitioner's argument is irrelevant.

The Ninth Circuit did not conclude that BRNA was involved in a Ponzi scheme. Rather, the Ninth Circuit concluded that an ordinary course of business defense only applies "to transfers by legitimate business enterprises" and concluded that "BRNA was [engaged in] a fraudulent business" 836 F.2d at 261. The Ninth Circuit did not conclude that BRNA was engaged in a Ponzi-like scheme.

The restriction of the ordinary course of business defense to legitimate business enterprises is well established. S.R. No. 95-989, 95th Cong., 2d Sess. 88 (1978); H.R. No. 95-595, 95th Cong., 1st Sess. 373 (1977) ("The purpose of this exception is to leave undisturbed normal financial relations . . ."). *Graulty v. Brooks (In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.)*, 819 F.2d 214 (9th Cir. 1987) (transfers made in connection with a Ponzi scheme not within the "ordinary course of business"); *Marathon Oil Co. v. Flatau (In re Craig Oil Co.)*, 785 F.2d 1563, 1567 (11th Cir. 1986) (ordinary course of business exception "is directed primarily to ordinary trade credit transactions"); *Barash v. Public Finance Corp.*, 658 F.2d 504, 511 (7th Cir. 1981) (idem.).

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[11] Even if Petitioner is correct that the applicable burden is a burden of production only, Petitioner did not submit evidence establishing a "contemporaneous exchange" or "ordinary course of business" defense.

III. The Other "Character of Reasons" Delineated in This Court's Rules for Issuing a Writ of Certiorari Are Not Applicable.

In petitioning this Court for a writ of certiorari, Petitioner does not assert any of the following grounds also usually relied upon by this Court in determining whether to grant certiorari:

> (a) When a federal court of appeals . . . has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> * * *
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court . . .

Rules of the Supreme Court of the United States, Rule 17.1(a) & (c). The reason for this omission is that none of these reasons for granting certiorari applies.

With respect to potential conflicts with state court decisions, the legal issues raised by Petitioner are in the main federal questions arising exclusively under the Bankruptcy Code. The only legal issue arguably involving California law is the creation of an express trust. *Toys "R" Us, Inc. v. Esgro, Inc. (In re Esgro, Inc.)*, 645 F.2d 794, 797 (9th Cir. 1981) (creation of a trust is an issue of state law). *But cf., Elliott v. Bumb*, 356 F.2d 749 (9th Cir.), *cert. denied*, 385 U.S. 829 (1966) (a trust beneficiary has the burden of identifying a trust *res* in order to enforce a trust in bankruptcy, notwithstanding applicable state law). On the issue of creating a trust, California law does not conflict with the decision in this case that Petitioner has the burden of identifying a trust *res*.

As a matter of California law, judicial enforcement of an express trust requires identification of the trust *res*. *Gonsalves v. Hodgson*, 38 C.2d 91, 98 (1951); *Corley v. Hennessy*, 58 Cal. App.2d 883, 885 (1943). Even where a trustee wrongfully commingles trust property, the burden of identifying a trust *res* remains with the trust beneficiary. *Kobida v. Hinkelmann*, 53 Cal. App.2d 186, 195 (1942); *Blackhurst v. Westerfeld*, 111 Cal. App. 548, 554 (1931).

On the issue of the nature of the judicial proceedings below, Petitioner does not suggest, nor is there anything in the record to substantiate a suggestion, that there was any departure from the normal and accepted course of proceedings.

Finally, there is no overriding question of law which this Court must decide. The Trustee's preference action is neither novel nor complex. The facts are established by the uncontroverted evidence. More importantly, as discussed above, the issues involved are the subject of nonconflicting decisions.

CONCLUSION

For the reasons and based on the authorities presented above, Petitioner's petition should be denied.

Respectfully submitted,

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